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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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JUN 13 1997

Federal Communications Commission
Office of Secretary

In the Matter of)

Advanced Television Systems)
and Their Impact Upon the)
Existing Television Broadcast)
Service)

MM Docket No. 87-268

To: The Commission

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PETITION FOR RECONSIDERATION AND CLARIFICATION

Cannell Cleveland, L.P., licensee of Television Station WUAB(TV), NTSC Channel 43, Lorain, Ohio ("Cannell"), by its attorneys, and pursuant to 47 C.F.R. § 1.429(a) (1996), hereby petitions the FCC for reconsideration and clarification of its Sixth Report and Order in the above-captioned proceeding¹ for the reasons described herein.

I. Introduction.

Cannell has been and remains committed to the implementation of digital television ("DTV") and applauds the Commission's efforts to bring DTV to the American public. Cannell requests, however, that the Commission reconsider certain aspects of the Sixth R&O as it applies to WUAB. First, the Commission should not finalize the DTV Table of Allotments or the DTV rules until broadcasters have had the opportunity to comment on OET Bulletin No. 69. Second, the Commission must reconsider its decision to condition grant of pending NTSC modification applications on the impact these modifications would have on DTV. Third, the Commission must reevaluate the first-adjacent criteria used to allot DTV

¹/ Sixth Report and Order, MM Docket No. 87-268, FCC 97-115 (released April 21, 1997) ("Sixth R&O").

channels. Clarification is requested with respect to coordination with the Canadian government on DTV assignments and the protection of NTSC coverage during the DTV transition period.

**II. The Commission Must Allow Broadcasters To Comment
on OET Bulletin No. 69 Before It Finalizes the DTV Table of Allotments.**

In order to evaluate whether the DTV Table implements the Commission's objectives in specific instances, interested parties must be able to calculate the interference that is likely to result and determine the service areas of new DTV stations in accordance with the Commission's methodology (Longley-Rice). But the critical piece of information necessary for stations to evaluate contours—*OET Bulletin No. 69*—has not been timely released though the Sixth R&O refers to it numerous times. Without *OET Bulletin No. 69*, it is impossible, for example, for stations to know precisely what operating parameters for the Longley-Rice methodology apply or what amount of interference is considered *de minimis*. In turn, it is impossible for stations to know how to assess the reasonableness of either their own DTV allotment or those of nearby licensees. Moreover, broadcasters are ill equipped to verify whether the DTV Table meets *any* standard of adequacy, much less whether it achieves the goals of service replication and minimal interference as the Commission contends.²

Therefore, before the rules and the DTV Table become final -- but *after* the Commission's methodology is made available -- the Commission should give interested parties a further opportunity to comment on the Table and the methodology. A brief

^{2/} As a matter of administrative law, the Commission must, of course, set forth the basis and underlying support for its rules in a manner that is sufficiently detailed to permit judicial review. See, e.g., National Nutritional Foods Association v. Weinberger, 512 F.2d 688, 701 (2d. Cir. 1975), cert. denied, 423 U.S. 827 (1975).

additional comment period of 90 days will not significantly delay implementation of the transition to DTV. Indeed, to the extent that there are problems with the DTV Table, the Commission can correct those problems more efficiently and expeditiously if they are identified in a further round of comments while this proceeding remains open rather than if such issues are raised in a plethora of separate petitions for rulemaking filed after the DTV Table becomes final.

III. The Commission Must Reconsider Its DTV Impact Policy.

On July 19, 1996, Cannell filed an application with the Commission to make minor changes to WUAB's NTSC facilities. See FCC File No. BPCT-960719KE. On July 25, 1996, the Commission adopted its Sixth Further Notice of Proposed Rule Making in this proceeding.³ In the Sixth Further Notice the Commission stated that in order to preserve its ability to develop the DTV Table, it would condition the grant of all applications for modification of NTSC facilities, both those pending on the date of adoption of the Sixth Further Notice (i.e., July 25, 1996), such as that filed by Cannell, and those filed after that date, on the outcome of its final decision on the DTV Table of Allotments. Sixth Further Notice, 11 FCC Rcd at 10993.

The Commission partially reconsidered this decision in the Sixth R&O. There it stated that in developing the Table, it took into account applications that were pending as of July 25, 1996 but which were granted prior to April 3, the adoption date of the Sixth R&O. Sixth R&O ¶ 106. The Commission also removed the DTV condition that had been placed on such permits. The Commission stated, however, that NTSC applications that were pending on July 25 but

³/ Sixth Further Notice of Proposed Rulemaking, MM Docket No. 87-268, 11 FCC Rcd. 10968 (1996)(the "Sixth Further Notice").

granted after April 3 would be evaluated based on any impact those stations' modified facilities would have on the DTV Table of Allotments. Id. ¶ 113.

The unfairness of this revised "DTV Impact" policy is clear. Broadcasters like Cannell who had modification applications pending on July 25, 1996 should not be subject to DTV constraints simply because the Commission did not complete processing of those applications prior to April 3. Indeed, the Commission provides no explanation of why some applications pending at that time were granted and why others were not or why the applications pending on April 3 must now fall at the mercy of the DTV Table of Allotments. Moreover, the Commission has provided no information on when, if ever, these pending applications will be granted or under what conditions they will be granted.

The Commission must reconsider the retroactive application of its DTV Impact policy not only because it is unfair but also because it is unconstitutional and contrary to the dictates of Melody Music, Inc. v. FCC.

A. Retroactive Application of the DTV Impact Policy Is Inequitable.

Retroactive application of the Commission's DTV Impact policy to NTSC applications filed prior to July 25, but granted after April 3, is unfair because this discrete group of broadcasters has reasonably relied to its detriment on the Commission's practice over the past nine years of not conditioning approval of modification applications on the outcome of the DTV proceedings. The Supreme Court has recognized that the "protection of reasonable reliance interests is not only a legitimate governmental objective; it provides 'an exceedingly persuasive justification.'"^{4/} Even the Commission has recognized the inequities of and the disruption that

^{4/} Heckler v. Mathews, 465 U.S. 728, 746 (1984).

can be caused by such a policy as evidenced by established precedent⁵ and the Commission's decision to remove the DTV Impact condition from construction permits granted prior to April 3. Sixth R&O ¶ 113.

Retroactive application of the DTV Impact policy serves only minimally the objectives the Commission cites in support of the policy. The Commission is concerned that the proposed changes to NTSC operations will affect DTV service area replication. However, processing only those applications already on file would not prevent the Commission from achieving this goal. The number of pending applications is finite; once approved they would not affect the DTV allotments any more than applications that were approved prior to April 3. In short, the minimal benefits that may accrue from application of the DTV Impact policy do not outweigh the substantial adverse impact such an action would have on this discrete group of TV stations.

B. Retroactive Application of the DTV Impact Policy Is Unconstitutional.

Federal agencies such as the FCC are precluded from issuing a rule or policy that has a retroactive and unequal effect unless Congress has explicitly conferred the power on the agency to do so.⁶ The Commission's decision to apply its DTV Impact policy retroactively violates this prohibition.

^{5/} Cf. Amendments of Parts 20 and 24 of the Commission's Rules, 3 CR 433, 471 (1996); CATV of Rockford, Inc., 38 FCC 2d 10, 15 (1972), recon. denied, 40 FCC 2d 493 (1973).

^{6/} Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).

The D.C. Circuit and the Commission have established five factors to be balanced in determining whether a new rule is being applied retroactively in violation of constitutional requirements:⁷ (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or just an attempt to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one.

Under these factors the Commission's decision was retroactively applied. This is not a case of first impression because the Commission has long-established procedures for processing TV modification applications. The DTV Impact policy also is a significant departure from the Commission's past practices. As discussed above, the Commission had not previously conditioned approval of modifications on any DTV proceedings, nor had it given any notice that this process would be changed to treat applications pending as of April 3 differently. In addition, the Commission commonly grandfathers applicants and licensees not in compliance with the newly announced rules. With regard to the third and fourth factors, broadcasters including Cannell relied heavily on the Commission's previous practices and procedures, going to great expense to prepare for the approval of its pending applications. Finally, there is no statutory provision that directs the Commission to apply its DTV Impact policy to applications filed prior to July 25, 1996 and pending as of April 3, 1997. Under this test, retroactive application of the DTV Impact policy to these pending applications is unconstitutional and must not be adopted.

⁷/ E.g., Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972); Adelphia Cable Partners, L.P., 2 CR 76, 82 (1995).

Although the Commission may deny an application if it changes the substantive standards for approving an application such that the applicant is no longer qualified,⁸ qualification is not at issue here. The DTV Impact policy is a procedural mechanism only.⁹ The Commission's decision in the Sixth R&O does not change the substantive standards for approving or disapproving modification applications nor does it disqualify any of the applicants. In short, the Commission does not have the authority to apply its conditional approval policy on a retroactive basis.

C. The DTV Impact Policy Violates Melody Music, Inc. v. FCC.

The Commission's decision in the Sixth R&O to treat some modification applications pending as of July 25, 1996 differently from other modification applications pending on that same date violates the Court of Appeals directive in Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965) ("Melody Music"). In the thirty years since Melody Music, the D.C. Circuit consistently has upheld the basic premise that similarly-situated parties must be treated the same unless the Commission can provide an adequate justification for disparate treatment.¹⁰ The Commission has not provided an adequate justification for treating station modifications granted prior to April 3 any different than those granted after April 3. Accordingly, the Commission must reconsider the retroactive application of the DTV Impact policy to Cannell and other similarly-situated broadcasters.

8/ E.g., United States v. Storer Broad. Co., 351 U.S. 192 (1956); Hispanic Info. and Telecomm. Network, Inc. v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

9/ Sixth Further Notice ¶ 63.

10/ McElroy Elec. Corp. v. FCC, 990 F.2d 1351, 1365 (D.C. Cir. 1993); See, e.g., Petroleum Comm., Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994); New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 366 (D.C. Cir. 1987).

IV. The Commission Must Reevaluate Its Criteria For Assigning First-Adjacent Channels.

The Commission should reconsider the criteria it has used to assign first-adjacent DTV channels. As demonstrated in the Engineering Statement of Donald Everist of the engineering firm of Cohen, Dippell & Everist (included in Exhibit A hereto) (the "Engineering Statement"), based on tests performed at the Advanced Television Technology Center in October 1996, DTV operation on a channel that is first-adjacent to an NTSC channel and that will operate close to or within the NTSC station's Grade B contour may cause excessive interference to the NTSC operation. See Engineering Statement at 4. As an example, the Commission has assigned DTV Channel 42 to WGGN(TV) in Sandusky, Ohio, located within the edge of WUAB's Grade B contour. This first-adjacent assignment could result in substantial interference to WUAB's NTSC signal. Cannell requests that the Commission reconsider this aspect of its assignment methodology to determine whether DTV channels could be allotted without creating interference to first-adjacent NTSC operations.

V. Commission Rules Should Protect Existing NTSC Coverage From Interference Caused By DTV Operations.

In the Sixth R&O, the Commission declined to adopt any special provisions that would mitigate interference among television stations during the DTV transition period. See Sixth R&O ¶ 87. The Commission reached this conclusion based on its estimate that the DTV Table of Allotments would fully protect 98.8% of the geographic area and 98.6% of the population served by existing stations. Id. Until these figures can be confirmed and broadcasters can assess completely levels of interference, the Commission should not

dismiss so quickly the need for interim measures to ensure against interference between NTSC and DTV operations during the DTV transition period.

Because of the unavailability of OET Bulletin No. 69, broadcasters have been unable to assess accurately the interference impact DTV operations will have on a station's NTSC coverage. Upon further review, broadcasters may determine that DTV-to-NTSC interference will be significant in particular circumstances (e.g., adjacent-channel, co-channel operations) and that interim measures may be necessary to minimize interference. See Engineering Statement at 4-5. For instance, Cannell is concerned that DTV cochannel operations in Detroit could interfere with its existing NTSC service, including service to its city of license, because of propagation conditions across Lake Erie. Id. at 3, n.2. Review and analysis of the OET technical standards should permit Cannell to determine more accurately whether such interference would occur. In situations where excessive interference is predicted or does in fact occur, licensees should be able to rely on Commission rules to protect NTSC service areas. Accordingly, to the extent any specific rules could be adopted that would provide for this protection for NTSC coverage, Cannell requests that the Commission use this reconsideration proceeding to take such action.

VI. Coordination With Canada Must Be Finalized.

Cannell strongly urges the Commission to conclude its coordination with Canada promptly so that WUAB's DTV channel assignment may be finalized.

VIII. Conclusion.

The Commission has made great strides in developing the DTV Table of Allotments and associated methodology. Nonetheless, the rules for this new service should not be

finalized until broadcasters have the opportunity to comment on the OET technical standards. Fundamental fairness requires that the Commission not finalize the DTV Table and rules until this comment process is complete.

The Commission also must reconsider the retroactive application of its DTV Impact policy. Retroactive application of this policy unfairly prejudices broadcasters like Cannell whose minor change applications were filed prior to July 25 but were not granted as of April 3, and clearly violates constitutional requirements and the mandate of Melody Music.

Cannell also requests that the Commission reevaluate its first-adjacent channel assignment methodology to ensure that such assignments do not cause undue interference to NTSC operations. Finally, the Commission must be mindful of the need to protect NTSC service areas to ensure that the public continues to receive free and uninterrupted over-the-air television service during the DTV transition period.

Respectfully submitted,

CANNELL CLEVELAND, L.P.

By: 

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June 13, 1997

EXHIBIT A

Engineering Statement of Cohen, Dippell & Everist

ENGINEERING STATEMENT
IN SUPPORT OF
PETITION FOR RECONSIDERATION
MM DOCKET 87-268
ON BEHALF OF
CANNEL CLEVELAND, L.P.

JUNE 1997

COHEN, DIPPELL AND EVERIST, P.C.
CONSULTING ENGINEERS
RADIO AND TELEVISION
WASHINGTON, D.C.

COHEN, DIPPELL AND EVERIST, P. C.

City of Washington)
) ss
District of Columbia)

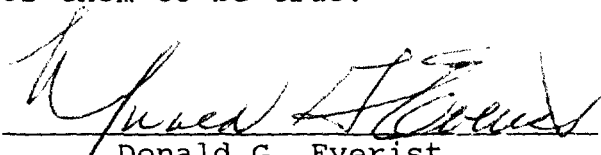
Donald G. Everist, being duly sworn upon his oath, deposes and states that:

He is a graduate electrical engineer, a Registered Professional Engineer in the District of Columbia, and is President of Cohen, Dippell and Everist, P.C., Consulting Engineers, Radio - Television, with offices at 1300 L Street, N.W., Suite 1100, Washington, D.C. 20005;

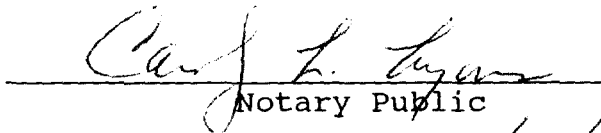
That his qualifications are a matter of record in the Federal Communications Commission;

That the attached engineering report was prepared by him or under his supervision and direction and

That the facts stated herein are true of his own knowledge, except such facts as are stated to be on information and belief, and as to such facts he believes them to be true.


Donald G. Everist
District of Columbia
Professional Engineer
Registration No. 5714

Subscribed and sworn to before me this 12th day of June, 1997.


Notary Public

My Commission Expires: 2/28/98

This engineering statement has been prepared on behalf of Cannell Cleveland, L.P. licensee of Station WUAB(TV) ("WUAB"), Lorain, Ohio. WUAB operates on Channel 43 with a maximum effective radiated power of 4680 kW. This statement is in support of a Petition for Reconsideration for the Sixth Report and Order, MM Docket No. 87-268¹ ("Report and Order") adopted by the Federal Communications Commission ("Commission").

WUAB has authorized this firm to conduct studies and review the various aspects of the Report and Order as it applies to WUAB. This study was conducted on the impact of the Report and Order on WUAB's current NTSC service area and the interference which could result to existing service by new digital operations and the service replication by the assigned digital television ("DTV") operation.

WUAB operates from a transmitter site located in Parma, Ohio. The transmitter site is centrally located to the Cleveland suburban area. WUAB is quite familiar in providing a competitive UHF signal in a highly urbanized area. WUAB has been assigned DTV Channel 28 with an effective radiated power of 120.3 kW and a height above average terrain of 336 meters.

This engineering statement focuses on those technical aspects of the Report and Order which are found to be vitally important to WUAB.

¹MM Docket No. 87-268, "In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service," adopted April 3, 1997.

COVERAGE ASSESSMENT

A study of the WUAB existing NTSC and proposed DTV service areas has been performed by using the National Telecommunications and Information Administration Institute for Telecommunication Sciences ("ITS") computer using the Communication System Performance Model--Point to Point Irregular Terrain HDTV Model ("HDTV model"). The HDTV model uses the Longley-Rice propagation methodology and evaluates in grid cell size 0.75-1.5 km with 3-second terrain data intervals between every 90 meters to 100 meters at one degree intervals. This HDTV model was selected since it is believed it generally replicates the Commission's DTV assignment model. An ITS representative indicates that it is their belief that this model follows the Commission's decisions in the Report and Order.

The Commission in its proposed rules, Section 73.622 and 73.623, specifies that OET Bulletin 69 will provide the details of its calculation methodology for service and interference. Further, the Report and Order does not disclose how the DTV assignments were made.

Without full knowledge of the Commission's calculation methodology for service and interference and the DTV frequency assignments WUAB cannot make an independent evaluation of what impact any DTV operation may have on its NTSC current service.

However, while it is useful to use the HDTV Model, it does not provide guidance for the Longley-Rice model used by the Commission to determine the DTV power to be authorized and the process by which the DTV frequency was selected. Without that determination, WUAB cannot make an assessment whether its inherent service area is being adequately protected² or whether service is being replicated. Until such specific information is available, no meaningful technical evaluation can be performed. This information has a direct impact on equipment selection decisions such as antenna and the DTV power to be used during the transition period. The Commission's DTV criteria needs to be well understood before a meaningful station DTV implementation program can be developed for WUAB.

Furthermore, the DTV facility specified as a companion channel for WUAB is for its licensed facility and not for the application on file, BPCT-960719KE. Therefore, it is requested that the Commission redetermine the WUAB DTV facility to correspond to the facilities filed in its application.

WUAB operates with a directional antenna. There is no assurance that a side-mounted DTV antenna will replicate the directional pattern that is envisioned by the FCC

²For example, WUAB is concerned that the Detroit DTV Channel 43 assignment could cause interference to its existing NTSC service including service to its city of license due to the unusual well known propagation conditions across the lake.

for the WUAB-DTV operation. Obviously if pattern replication is placed in doubt, the replicated service area projected by the Commission cannot be achieved.

FIRST ADJACENT DTV OPERATION

WUAB is concerned that the first-adjacent channel DTV facility assigned to WGGN, DTV Channel 42 in Sandusky, Ohio may cause interference to WUAB's NTSC operations. WUAB believes that based upon tests performed in October 1996 by the Advanced Television Technology Center that the first-adjacent channel criteria used for the Commission's DTV assignment model may be inappropriate. It is understood that all first-adjacent channel ratios used in the Commission's DTV model are based upon data measured using a linear (Class A) testbed. WGGN DTV facilities are listed for an average power level of 50 kW. This power level can be generated with RF amplifiers operating in the Class A-B mode. It is well known that intermodulation products will occur when the RF power is developed in devices not perfectly linear. In addition, non-linear propagation path effects such as multipath also can occur. The location of first-adjacent DTV signals at or near an NTSC Grade B contour needs to be studied further in view of these recent tests.

INTERNATIONAL ISSUE

The Report and Order indicates that considerable effort has been directed to coordination issues with the Canadian government. However, it does not provide any insight when the Commission will conclude that effort. Therefore, WUAB's DTV assignment faces uncertainty until the U.S.-Canadian DTV television coordination is finalized.